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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

THE TRAVELERS INDEMNITY COMPANY, *Petitioner*,

v.

ERICKSON'S, INC., *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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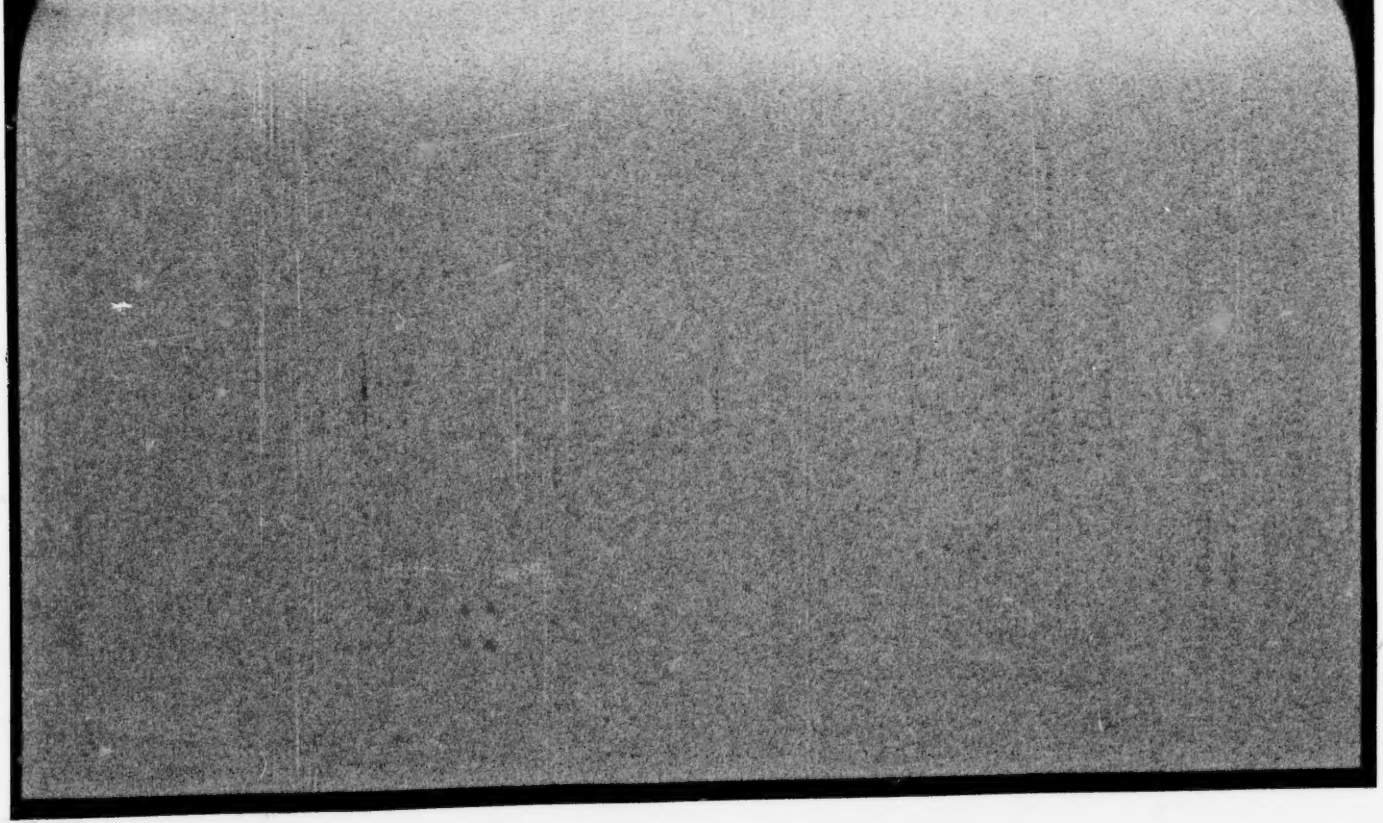

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, The Travelers Indemnity Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit made and entered in the above cause on January 25, 1972.

OPINIONS BELOW

The opinion and judgment by the Honorable Thomas J. Clary, United States Senior District Judge for the U.S. District Court, Eastern District of Pennsylvania,

sitting by designation, were dated April 28, 1971 and May 16, 1971, respectively, and were entered on May 3, 1971 and May 20, 1971, after the same had been transmitted to the Clerk of the U.S. District Court for the Southern District of Georgia for filing in Civil Action No. 2073, Savannah Division (Record pp. 935-947, 948-951). Said opinion and judgment are reported at 330 F. Supp. 380 (S.D. Ga. 1971). Copies are appended to this petition in the Appendix at pp. A7-A10, A11-A12.

The per curiam opinion and judgment rendered by the United States Court of Appeals in Case No. 71-2899 on January 25, 1972, is reported at 454 F.2d 884 (5th Cir. 1972). A copy of said opinion and judgment is appended to this petition in the Appendix at pp. A15-A16.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit was dated and entered on January 25, 1972 (Appendix pp. A16-A17). A Petition for Rehearing was filed on February 5, 1972 and was denied on February 24, 1972 (Appendix p. A17).

The statutory provision confering jurisdiction upon this Court to review the opinion and judgment in question is 28 *United States Code* § 1254, which provides as follows:

> "28 U.S.C. § 1254. *Court of Appeals; certiorari; appeal; certified questions.* Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . ."

QUESTIONS PRESENTED FOR REVIEW

This case involves a suit by Erickson's, Inc., a plumbing, heating, and air conditioning subcontractor of Peacock Construction Company, against The Travelers Indemnity Company on a labor and material bond (Record pp. 687-693). The case was referred to a special master, who awarded the plaintiff $80,974.76, plus seven per cent (7%) prejudgment interest on said amount (Record pp. 54-63; Appendix pp. A1-A7). The amount of the prejudgment interest involved is approximately $25,000.00. The questions presented for review concern the erroneous award of prejudgment interest and the erroneous affirmance of said award by both the U.S. District Judge and the United States Court of Appeals for the Fifth Circuit (Record pp. 935-947, 948-951; Appendix pp. A7-A12, A13-A14, A15-A16), in spite of the fact that such award of prejudgment interest was clearly contrary to Georgia law.

The questions presented are:

1. Whether the Court of Appeals and the District Judge erred in allowing prejudgment interest on an unliquidated claim, where the same was clearly not recoverable under Georgia law and where said decision was in conflict with decisions of the Supreme Court of Georgia and the Court of Appeals of Georgia.

2. Whether the Court of Appeals and the District Judge erred in refusing to follow prior decisions of the Fifth Circuit Court of Appeals and Georgia District Courts, which correctly stated the Georgia law and refused to allow prejudgment interest.

3. Whether the Court of Appeals and District Judge erred in applying the law of States which allow prejudgment interest, in direct contravention of the rule

laid down in *Erie R. Co.* v. *Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), and *Klaxon Co.* v. *Stentor Electric Mfg. Co.,* 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941).

PERTINENT GEORGIA STATUTES

Georgia statutes that are pertinent to the case *sub judice* are § 57-106 and § 57-110 of the 1933 *Code of Georgia,* which have also been published as § 57-106 and § 57-110 of the *Georgia Code Annotated,* 1971 Revision, Book 17, pp. 757 and 762. These statutes provide, as follows:

> "57-106. *Lex loci contractus to govern interest.* —Every contract shall bear interest according to the law of the place of the contract at the time of the contract, unless upon its face it shall be apparent that the intention of the parties referred the execution of the contract to another forum; in this case, the law of the forum shall govern."

> "57-110. *Interest on liquidated demands; promissory notes payable on demand.*—All liquidated demands, where by agreement or otherwise the sum to be paid is fixed or certain, bear interest from the time the party shall become liable and bound to pay them. In the case of promissory notes payable on demand, the law presumes a demand instantly and gives interest from date (Acts 1858, p. 90)."

STATEMENT OF THE CASE

On August 12, 1963, Erickson's, Inc., entered into a subcontract with Peacock Construction Company, under which Erickson's was to do the plumbing, heating, and air conditioning work for a new addition to the Glynn-Brunswick Memorial Hospital, Brunswick, Georgia. The subcontract was signed in Savannah,

Georgia, and all work was to be performed in Brunswick, Georgia (Plaintiff's Exhibit P-4). The amount of this subcontract was $684,400.00.

Pursuant to Georgia law and the general contract with the owner (Plaintiff's Exhibit P-1), Peacock Construction Company furnished a labor and material payment bond (Plaintiff's Exhibit P-2; Record pp. 692-693). The surety on said bond was The Travelers Indemnity Company, the Petitioner herein.

Work under the subcontract began in September 1963 and was substantially completed on or about May 31, 1966 (Defendant's Exhibit D-9). During this period, 17 change orders were issued by Peacock Construction Company. Progress payments during this time amounted to $612,551.45.

The pertinent facts relating to the issue of prejudgment interest are as follows. On April 22, 1966, Erickson's wrote a letter to the Owner that the amount owed under the subcontract at that time "approaches $100,000.00." (Defendant's Exhibit D-8; Record pp. 449-450). Copies of this letter were sent to the architects and Peacock. On that same day, April 22, 1966, Erickson's submitted its Request for Payment Number 28 to Peacock in the total amount of $89,570.26 (Plaintiff's Exhibit P-8; Record pp. 450-451). On June 16, 1966, Erickson's wrote another letter to the Owner, stating that "there is an outstanding balance of approximately $132,477.76" and attached to the letter an affidavit signed by Mr. T. W. Erickson setting forth that on June 16, 1966, Peacock owed Erickson's the said amount and that Erickson's had completed its work on the project on or about May 31, 1966. (Defendant's Exhibit D-9; Record pp. 454, 457).

On July 5, 1966, Erickson's wrote to Travelers stating that "there is an outstanding balance of approximately $117,192.18" (Defendant's Exhibit D-10; Record p. 461). No payments were made by Peacock to Erickson's between June 15, 1966 and August 31, 1966, but on the latter date, Erickson's submitted a final bill to Peacock showing a total contract price of $709,-893.28, less total payments received, for a balance due of $97,341.83 (Plaintiff's Exhibit P-8). On the same day, that is August 31, 1966, the books and records of Erickson's indicated a total amount due from Peacock of $82,162.13 (Plaintiff's Exhibit P-7; Record pp. 460-461).

On November 29, 1966, in an effort to compromise this matter, Peacock issued its check to Erickson's for $77,646.58. At that time, Erickson's contention was that the total contract price should be $709,893.28. Peacock's records indicated that the total contract price, including all approved change orders, amounted to $692,143.84 and that there were back charges against Erickson's in the amount of $9,363.81. Both parties agreed that the total payments made from Peacock to Erickson's was $612,551.45. Peacock contended that it only owed $70,228.58, while Erickson's demanded $97,-341.83. Thus, it is seen that there was an obvious dispute as to the total amount owed under the subcontract and that the demand of Erickson's was clearly unliquidated.

On December 16, 1966, Erickson's, Inc., a Georgia corporation, filed suit in the U.S. District Court on the labor and material payment bond issued by The Travelers Indemnity Company, a Connecticut corporation (Record pp. 687-693). Jurisdiction of the District Court was invoked under 28 U.S.C. § 1332, which pro-

vides, *inter alia:* "(a) the district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—(1) citizens of different States;..."

The original complaint was in four counts and alleged a total indebtness under the subcontract in the amount of $96,836.40, plus interest at seven per cent (Record p. 691). The complaint alleged that the $96,836.40 *ad damnum* represented sums due for specified work, work done under change orders, items of extra work, and damages for delay.

On February 1, 1967, Erickson's filed a motion for partial summary judgment in the amount of $77,646.58, based on the tender of the check in that amount on November 29, 1966 (Record pp. 704-705), by Peacock. This partial motion for summary judgment was granted by the District Court on April 6, 1967 (Tr. 764-676). Travelers appealed (Record p. 767) and, although the appeal was dismissed on the ground that it was from an interlocutory order, the Fifth Circuit Court of Appeals stated that the District Judge erred in granting the partial motion for summary judgment and should vacate said order. See, *The Travelers Indemnity Company* v. *Erickson's, Inc.*, 396 F.2d 134 (5th Cir. 1968).

On May 6, 1969, the case was referred to a special master (Record pp. 777-779). Subsequently, the case was tried before the Honorable Perry Brannen, Special Master, in Savannah, Georgia. The transcript of the evidence and proceedings appear at pages 1 through 685 of the Record. On March 15, 1971, the Special Master entered a report which awarded Erickson's the sum

of $79,592.39, plus seven per cent prejudgment interest (Appendix pp. A1-A7; Record pp. 866-877).

In May 1971, the District Judge entered an order and judgment in which the principal was reduced to $79,058.24, allowing a set-off in the amount of $536.15, and the award of prejudgment interest in the amount of approximately $25,000.00 was affirmed (Appendix pp. A7-A10, A11-A12; Record pp. 935-951). See *Erickson's, Inc.* v. *The Travelers Indemnity Company,* 330 F. Supp. 380 (S.D. Ga. 1971). Travelers filed a motion for new trial and rehearing and a motion to amend findings of fact, conclusions of law and judgment (Record pp. 951-956). These motions were overruled by the District Judge in an order entered on July 27, 1971 (Appendix pp. A13-A16; Record pp. 948-951), and Travelers appealed (Record p. 961).

On January 25, 1972, the Fifth District Court of Appeals entered an order and judgment affirming the award of prejudgment interest (Appendix pp. A15-A16). See, *Erickson's, Inc.* v. *The Travelers Indemnity Company,* 454 F.2d 884 (5th Cir. 1972). The petition for rehearing was denied on February 24, 1972 (Appendix A17).

ARGUMENT

I.

The Court of Appeals and the District Judge erred in allowing prejudgment interest on an unliquidated claim, where the same was clearly not recoverable under Georgia law and where said decisions were in conflict with decisions of the Supreme Court of Georgia and the Court of Appeals of Georgia.

The Court of Appeals and the District Court both erred in allowing prejudgment interest, in the amount of approximately $25,000.00, on an unliquidated claim.

These decisions are in conflict with decisions of both the Supreme Court of Georgia and the Court of Appeals of Georgia—*viz., First National Bank of Atlanta* v. *State Highway Department,* 219 Ga. 144, 132 S.E.2d 263 (1963); *Brown* v. *Parks,* 190 Ga. 540, 9 S.E.2d 897 (1940); *Fireman's Insurance Company* v. *Oliver,* 182 Ga. 212, 184 S.E. 858 (1940); *Lincoln Lumber Company* v. *Keeter,* 167 Ga. 231, 145 S.E. 68 (1928); *Roberts* v. *Prior,* 20 Ga. 561 (1856); and *Nisbet* v. *Lawson,* 1 Ga. 275, 287 (1846); *Colevins* v. *National Union Fire Insurance Company of Pittsburgh, Pa.,* 110 Ga. App. 533, 139 S.E.2d 145 (1964); and *Cowart* v. *Reeves,* 80 Ga. App. 161, 55 S.E.2d 911 (1949). These decisions have uniformly held that prejudgment interest cannot be allowed on an unliquidated claim. Moreover, this principle was codified in § 57-110 of the 1933 *Code of Georgia,* unofficially published as § 57-110 of *Georgia Code Annotated,* which provides that interest accrues only on "liquidated demands, where by agreement or otherwise the sum to be paid is fixed or certain. . . ."

In *First National Bank of Atlanta* v. *State Highway Department,* 219 Ga. 144, at page 147, the rule was stated as follows:

> "All liquidated demands, where by agreement or otherwise the sum to be paid is fixed or certain, bear interest from the time the party shall become liable and bound to pay them; . . ." *Code* § 57-110. A liquidated demand is 'an amount *certain* and *fixed,* either by the act and agreement of the parties or by operation of law; *a sum which cannot be changed by the proof;* . . ." *Nisbet* v. *Lawson,* 1 Ga. 275, 287; *Hargroves* v. *Cooke,* 15 Ga. 321 (12); *Bartee* v. *Andrews,* 18 Ga. 407; *Roberts* v. *Prior,* 20 Ga. 561; *Lincoln Lumber Co.* v. *Keeter,* 167 Ga. 231, 236 (145 S.E. 68); *Firemen's Ins. Co.* v. *Oliver,* 182 Ga. 212 (184 S.E. 858)."

In *Brown* v. *Parks,* 190 Ga. 547, at page 546, the Georgia Supreme Court said:

> "6. The judge and the auditor properly refused to allow interest in favor of the plaintiff against the administrator, except from the date of the auditor's report, then for the first time fixing any liquidated amount due to the plaintiff."

In 1856, in *Roberts* v. *Prior,* 20 Ga. 561, Justice Lumpkin, who was appointed to the Supreme Court when it was first established in Georgia in 1846, stated:

> "[2] we had supposed that if anything was settled, this point was. In *Nisbet* and *Lawson,* we stated the rule to be, that whenever the demand was fixed and certain, either by the agreement of the parties or by operation of law, that it was liquidated, with or without writing. And Mr. *Bouvier* says: 'Liquidated' is that which is made clear, certain, manifest; as, liquidated damages, ascertained damages; liquidated debt, an ascertained debt, as to amount. A debt is liquidated when it is certain what is due and how much is due: *cum certum est an et quantum debeatur.* For although it may appear that something is due, if it does not also appear how much is due, the debt is not liquidated.
>
> [3] An unliquidated claim is one which one of the parties to the contract cannot alone render certain. (2 *Bouvier's Law Dictionary,* p. 86.)"

In determining whether Erickson's claim was unliquidated, the nature of the claim must be considered. Although Erickson's set out its claim for damages in five separate counts, the first four in the original complaint claiming a total of $96,836.40 and Count V in the amount of $3,849.15, all arise out of the same contract and the same transaction between the parties and,

as a result, constitute a single claim. When the lower Court granted a partial summary judgment and Travelers appealed to the Fifth Circuit Court of Appeals, it contended that the lower Court did not have authority or power to grant a partial summary judgment where the overall cause of action arose out of a single claim against Travelers. It is still the contention of Travelers that there was but one contract and a single claim for monies due under the contract. The attempt of Erickson's to compartmentalize the items of damage cannot change the nature of Erickson's claim. As a result, Counts II, III, IV and V of the Complaint have no independent existence separate and apart from the contract and, as a result, the Complaint stated a single claim simply composed of several elements of damage. See *Marino* v. *Nevitt*, 311 F.2d 406 (3rd Cir. 1963). In order to have separate claims, the items alleged in a complaint must arise out of wholly separate and distinct transactions. *Reeves* v. *Beardall*, 316 U.S. 283, 62 S.Ct. 185 (1942); and *Coffman* v. *Federal Laboratories, Inc.*, 171 F.2d 94 (3rd Cir. 1948). In the *Reeves* case, this Court stated, as follows:

> "The rules make it clear that it is 'differing occurrences or transactions, which form the basis of separate units of judicial action'. *Atwater* v. *North American Coal Corporation*, 111 F.2d 125, 126 (2nd Cir.) . . . The judgment here in question meets that test. The claim against respondent on the promissory note was unrelated to the claim on the contract not to change the will. *Those two claims arose out of wholly separate and distinct transactions* or engagements." (Emphasis supplied)

Since all of the items of damage alleged by Erickson's arose out of the work done under one subcontract, there is but a single claim which is unliquidated.

That the amount in controversy was an unliquidated demand is clearly demonstrated by the conflicting claims and contentions of Erickson's, Inc., on different occasions between April 22, 1966 and November 29, 1966, that the amount owed was $100,000, $89,570.26, $132,477.76, $117,192.18, and $97,341.83.[1] Further evidence that the claim was unliquidated is that, while the amount originally sued for was $96,836.40 (Record p. 691), the award of the special master, as reduced by the District Judge to allow an offset of $536.15, was only $79,058.24. The fact that the award was substantially less than any amount ever demanded by Erickson's and substantially less than the amount sued for makes it clear that this was not a case in which the parties to the contract could alone render certain. See, *Lincoln Lumber Company* v. *Keeter,* 167 Ga. 231, at page 236, in which the Supreme Court of Georgia held, as follows:

> "A debt is liquidated when it is certain how much is due and when it is due. An unliquidated claim is one which one of the parties to the contract or the transaction cannot alone render certain. *Roberts* v. *Prior,* 20 Ga. 561. The general rule is that interest is not recoverable upon unliquidated demands, but is allowable only after such demands shall have become merged in a judgment. In order to recover interest there must be a fixed and determinate amount which could have been tendered and interest thereby stopped. Where parties agree to submit the amount of a demand to the decision of others, or to be determined by the Court, interest will not be allowed prior to the date of such decision."

---

[1] A state court complaint pertaining to these conflicting claims was held to state a cause of action for libel. See *Peacock Construction Company* v. *Erickson's, Inc.,* 121 Ga. App. 544, 174 S.E.2d 276 (1970).

Another statement of the applicable law of Georgia is set forth in 8 *Encyclopedia of Georgia Law,* Damages, Section 9, page 35, wherein it is stated:

> "A debt or demand is liquidated when agreed on by the parties or fixed by operation of law. An unliquidated claim is one which one of the parties to a contract cannot alone render certain. Liquidated damages are those which are clear, certain, manifest, and ascertained. A liquidated debt is an ascertained debt as to amount. *Although it may appear that something is due, if it does not appear how much is due, the debt is not liquidated.* A debt is liquidated when it is rendered certain what is due and how much is due. . . . A liquidated claim is one which cannot be changed by proof. It is so much or nothing." (Emphasis supplied)

Apparently, the Court of Appeals and the District Judge felt that the fact that Peacock offered to compromise the claim for $77,646.58 was an admission of liability that made the amount liquidated. In this regard, both Courts erred, since it is clear that a conditional tender in an effort to compromise a claim does not amount to a liquidation. *Colevins* v. *National Union Fire Insurance Company of Pittsburgh, Pa.,* 110 Ga. App. 533, 139 S.E.2d 145 (1964); and *Lumbermen's Mutual Insurance Company of Mansfield, Ohio* v. *Cantex Manufacturing Company,* 262 F.2d 63 (5th Cir. 1958).

In *Colevins* v. *National Union Fire Insurance Company of Pittsburgh, Pa.,* 110 Ga. App. 533, at page 535, the Georgia Court of Appeals, in commenting on the effect of such a conditional tender, stated:

> "Furthermore, the tender of the $5,500 was made on the condition that it be accepted as full and complete settlement of all sums due by it under

> the policy. The tender was not accepted and the amount fixed by the jury was the liquidated sum found to be due and it does not bear interest until after the jury verdict liquidating the amount recoverable. *Fireman's Ins. Co.* v. *Oliver,* 182 Ga. 212 (184 S.E. 858)."

In *Lumbermens Mutual Insurance Company of Mansfield, Ohio* v. *Cantex Mfg. Co.,* 262 F.2d 63, the Fifth Circuit Court of Appeals stated, at page 67:

> [9] Plaintiff has also argued that interest should be awarded on $35,000.00, or at least $31,569.97, from the date when suit was filed, in view of the fact that defendant's answer to the amended complaint stated that it offered $35,000.00 in settlement of the claim prior to the filing of suit. We agree with defendant's reply that a settlement offer is an offer to compromise disputed issues and is not a liquidation of a claim unless it is accepted."

Petitioner respectfully submits that, Peacock having tendered a fair sum as an offer of compromise, even though the tender was conditional upon accepting it as full and final settlement, and Erickson's having refused the tender and filed suit for a sum approximately $20,000 more than Peacock contended in good faith was due, there was but one course of action for Peacock to follow. There was a legitimate dispute and the mere fact that the matter did not come to trial for more than three years from the time the suit was filed should not affect the ultimate outcome of the case.

The tender by Peacock of the check dated November 29, 1966, in the amount of $77,646.58, represented its appraisal of its ultimate liability and was not intended as an amount to be credited on the amount of loss to be found by the jury. While Erickson's was successful at

the trial in avoiding Peacock's assessment of the claim by recovering a total of $79,058.27, it is submitted that the amount fixed by the Special Master was the liquidated sum and that no part of that sum should bear interest prior to the date of judgment, that is, May 20, 1971. The mere fact that Peacock admitted it owed some amount of money does not make the claim of Erickson's liquidated.

Based upon the foregoing, Travelers respectfully submits that the Court erred in awarding interest on any sums of money prior to the date of judgment.

II.

The Court of Appeals and the District Judge erred in refusing to follow prior decisions of the Fifth Circuit Court of Appeals and Georgia District Courts, which correctly stated the Georgia law and refused to allow prejudgment interest.

Petitioner shows that the decisions of the Court of Appeals and the District Judge are in conflict with prior decisions of the Fifth Circuit Court of Appeals and Georgia District Courts —*viz., Browne* v. *Makin,* 177 F.2d 753 (5th Cir. 1949) (a case involving a special master); *Merchants Insurance Company* v. *Lilgeomont, Inc.,* 84 F.2d 685 (5th Cir. 1936); *Aetna Insurance Company of Hartford, Conn.* v. *Taylor,* 86 F.2d 225, 227 (5th Cir. 1936); *Lumbermen's Mutual Insurance Company of Mansfield, Ohio* v. *Cantex Manufacturing Company,* 262 F.2d 63 (5th Cir. 1968); *Eastern Federal Corporation* v. *Abco-Embassy Pictures Corporation,* 331 F.Supp. 1253 (N.D. Ga. 1971); *United States* v. *City of Rossville,* 249 F.Supp. 701 (N.D. Ga. 1966); unreported decision of Judge F. M. Scarlett in *McCullough Industries, Inc.* v. *Peacock Construction Company,* Civil Action No. 790, U.S.D.C. S.D. Ga., decided November 1, 1968 (a case involving a special

master and another subcontract on the same construction project as the present case) (Appendix pp. A18-A-22); and unreported decision of Judge F. M. Scarlett in *McCullough Industries, Inc.* v. *Peacock Construction Company,* Civil Action No. 791, U.S.D.C. S.D. Ga., decided November 1, 1968 (a case involving a special master and the construction of Tift County Hospital) (Appendix pp. A23-A26). The cited cases fully discuss the Georgia law pertaining to the allowance of prejudgment interest and constitute clear precedents that should have been followed in this case.

In *Brown* v. *Makin,* 177 F.2d 253, a case involving a special master, the Court of Appeals for the Fifth Circuit held as follows:

> "As to appellee's claim for interest, it need only be said that interest runs from the date of the judgment and not from the date of the jury's verdict. The claims here were not liquidated or even ascertainable until the master made his findings. Under Georgia law, interest is not recoverable on an unliquidated demand."

In two unreported cases, presenting the same issue as to whether prejudgment interest should be allowed, the Honorable Frank M. Scarlett, U.S. Senior District Judge for the Southern District of Georgia, held that the special master erred in including prejudgment interest in his award. One of these cases, *McCullough Industries, Inc.* v. *Peacock Construction Company,* Civil Action No. 790, involved another subcontract on the same construction project, the addition to the Glynn-Brunswick Hospital, Brunswick, Georgia, that is involved in the present case. The other case, *McCullough Industries, Inc.* v. *Peacock Construction Company,* Civil Action No. 791, arose out of a subcontract

in connection with the construction of the Tift County Hospital. Copies of the judgments and special master's reports are set out in the Appendix at pages A17-A26.

In his order dated May 3, 1971, awarding prejudgment interest (Record pp. 935-948), Judge Clary did not follow the law of Georgia, but relied upon decisions from other jurisdictions which allow prejudgment interest even where the amount in controversy is not liquidated (Record p. 938). Under *Erie Railroad Co.* v. *Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), and *Klaxon Co.* v. *Stentor Electric Mfg. Co.,* 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941), both the District Court and Fifth Circuit Court of Appeals must apply the law of Georgia, not the law of other states. Appellant submits that the failure to properly apply the law of Georgia was due to the fact that Judge Clary normally sits in Philadelphia, Pennsylvania, and, therefore, was not as familiar with the law of Georgia as the authors of the opinions in the decisions of the Fifth Circuit Court of Appeals and Georgia District Courts previously referred to herein. All of those cases make it quite clear that, insofar as Georgia law is concerned, there can be no award of prejudgment interest where the amount in controversy is unliquidated.

III.

The Court of Appeals and the District Judge erred in applying the law of States which allow prejudgment interest, in direct contravention of the rule laid down in Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), and Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941).

In addition to the erroneous holding that Erickson's claim was liquidated, the District Judge went further and held that, even if the claim was not "liquidated,"

Erickson's would still be entitled to prejudgment interest, citing three cases from other jurisdictions—*i.e., Aetna Casualty & Surety Co.* v. *U.S.*, 365 F.2d 997, 1006 (8th Cir. 1966); *Michelsen* v. *Penney*, 135 F.2d 409 (2nd Cir. 1943); and *Fluor Corporation* v. *U.S. ex rel Mosher Steel Co.*, 405 F.2d 823 (9th Cir. 1969). The affirmance of such holding by the Court of Appeals is clearly not in accord with the prior decisions of this Court or the prior decisions of the Fifth Circuit Court of Appeals—*viz., Erie Railroad Company* v. *Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938); *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941); *Petersen* v. *Klos*, 433 F.2d 911 (5 Cir. 1970); and *Texaco, Inc.* v. *Lirette*, 410 F.2d 1064 (5 Cir. 1969).

In *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487, the question arose as to the applicability of a New York statute which directed that in contract actions, interest should be added to the principal sum "whether theretofore liquidated or unliquidated." In its opinion, at page 497, this Court stated:

> ". . . the proper function of the Delaware federal court is to ascertain what the state law is, not what it ought to be."

In *Peterson* v. *Klos*, 433 F.2d 911 (5 Cir. 1970), the Court of Appeals for the Fifth Circuit stated:

> "We agree with the parties that in this diversity case state law governs the award of interest."

That Georgia law is to be applied is further made clear by § 57-106 of the 1933 *Code of Georgia*, also published as § 57-106 of *Georgia Code Annotated*, which provides that:

> "Every contract shall bear interest according to the place of contract, unless upon its face it

shall be apparent that the intention of the parties referred the execution of the contract to another forum; in this case, the law of the forum shall govern."

The subcontract dated August 12, 1963 (Plaintiff's Exhibit P-4), was signed in Savannah, Georgia, and all work was to be performed in Brunswick, Georgia. No mention was made of any other forum. Therefore, the Georgia law as to prejudgment interest must be applied.

The decisions relied upon by the District Judge and the Court of Appeals in allowing prejudgment interest involved the law of Arizona, California, New York, and South Dakota, where a different rule of law appertains as to the allowance of prejudgment interest on unliquidated claims. The rule of law stated in such decisions is followed in many jurisdictions, including Pennsylvania, where Judge Clary normally holds court, and is the rule stated in § 337 of the *Restatement of Contracts*. However, as this Court said in *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487, the proper function of a Georgia federal court is to ascertain what the state law is, not what it ought to be. Thus, it was error for the District Judge and the Court of Appeals to fail and refuse to apply controlling Georgia law.

IV.

Conclusion

Petitioner shows that the Court of Appeals and the District Judge both erred in allowing prejudgment interest on an unliquidated claim. The holdings of both courts are in direct conflict with Georgia statutes and decisions of the Supreme Court of Georgia and the Court of Appeals of Georgia that, for more than 125

years, have uniformly held that prejudgment interest cannot be awarded on an unliquidated claim. Moreover, both courts ignored and refused to follow prior decisions of the Fifth Circuit Court of Appeals and Georgia District Courts which have correctly applied the Georgia law and refused to allow prejudgment interest under similar circumstances. Finally, in applying the law of States other than Georgia, both Courts acted in direct contravention to the holding in *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487, that the treatment of interest in diversity cases is a matter of State law.

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

C. JAMES JESSEE, JR.
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Attorney for Petitioner

(1) OPINIONS, JUDGMENTS AND ORDERS OF THE DISTRICT COURT AND THE FIFTH CIRCUIT COURT OF APPEALS

[A] Report of the Special Master Dated March 15, 1971 in the District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

CIVIL ACTION
FILE NO. 2073

ERICKSON'S, INC.,

Plaintiff,

v.

THE TRAVELERS INDEMNITY COMPANY,
Defendant.

To the Honorable United States District Court
For the Southern District of Georgia

The report of PERRY BRANNEN, SPECIAL MASTER, to whom this cause stands referred for the purpose of taking and hearing evidence offered by the respective parties, and to make his findings and conclusions on all issues presented and to recommend the judgment to be entered thereon, and making this his report to the Court separately, stating his findings of facts and conclusions with all the evidence introduced before him, pursuant to Order of Court dated May 6, 1969.

Having heard the evidence in the presence of the parties and their counsel, my findings of facts as to each separate count of the Complaint is as follows:

COUNT ONE

At the beginning of the taking of evidence, the counsel for Defendant stated:

> "We're willing to agree to the following, subject to any claim for interest and subject to any back charge

that we may have for any reason, a contract price of $684,400.00 lump sum contract price; add to that sum $7,743.84 representing change orders One through Seventeen (Peacock's) they not being in dispute for a total of $692,143.84—less cash payments made by Peacock to Erickson in the sum of $79,592.39, and from that figure will have to be taken, plus or minus, depending upon other claims that they present, or set offs, back charges, that the Defendant presents."

The Master finds as a matter of fact that the sum sued for in Count One in the amount of $71,823.55, plus Change Orders One through Seventeen (Peacock's) in the amount of $7,743.84 equal the sum admitted to be due by Defendant. Therefore, the amount of $71,848.55 claimed in Count One is included in the admitted sum, and Judgment is recommended for Plaintiff for this sum plus interest from the 11th day of December, 1966, at the rate of Seven (7%) per cent.

Count Two

Count Two seeks to recover $9,808.15 for additional labor and additional materials on the project referred to in the Complaint under certain change orders.

It appears that the change order numbers of the parties are not the same. Peacock admits his change orders One through Seventeen are payable in the amount of $7,743.84. These numbered change orders compared to Erickson's change order numbers leaves for determination Erickson's change orders 11, 13, 15, 23, 38 and 42, which are not included in Peacock's change orders One through Seventeen.

Change Orders 11, 13, 15, 23 and 38 should be denied since there is no evidence to show any of them were made within one week as provided in the contract between Peacock and Erickson's. (Section 5-C of the contract).

The Change Order 42 was authorized by the architect and the authorization was transmitted by Peacock to Erickson.

Therefore, work done by Erickson's on this change order was authorized work and the amount of $1,382.37 was proven to be a reasonable charge for the work done. This sum plus the sum of $7,743.84 equals $9,126.21 which is the total amount found by the Special Master to be due and owing by Peacock to Erickson on Count Two, and Judgment is recommended for this sum plus interest on the sum of $7,743.84 from the 11th day of December, 1966, at Seven (7%) per cent, and interest on the sum of $1,382.37 from the 11th day of December, 1966, at Seven (7%) per cent.

COUNT THREE

In Count Three, Erickson contends that he should collect for the installation of sleeves and inserts. Erickson by his contract agreed that the materials to be furnished and work to be done by Erickson are all plumbing and heating and air conditioning described in Section 58, Plumbing, and Section 59, Heating and Air Conditioning, of project specifications and as shown on applicable drawings. Sections 58 and 59 require sleeves and inserts. The contention of Erickson that he was only to mark where the installation would be is not in the opinion of the Special Master a tenable position. This type of work is done by plumbers and the evidence would further show that if the sleeves and inserts were not properly placed the result would be disastrous. Further the evidence shows that Erickson made complaint, did not want to do the work and was advised to exercise his right to arbitrate as provided by the contract, which he did no do, and thereafter made claim with knowledge that Peacock was insisting that the work be done as the obligation of Erickson under the contract.

The preponderance of the evidence is that it is customary for sleeves and inserts to be installed by the plumbing and heating and air conditioning sub-contractors.

Further the claim of Erickson was not filed with Peacock within seven days from the completion of the work. It ap-

pears from P-18 that the last claim for labor was for the week ending January 16, 1966 and that on July 22, 1966 Erickson sent to Peacock a statement designated Change Order Number 3 Amendment No. 1 showing the sum of $10,577.02. It is further the opinion of the Special Master that for the above reasons and all of the evidence that Count Three should be denied and it is so recommended.

Count Four

Count Four seeks to recover the sum of $4,602.68 as the wages of Erickson's Foreman from the week ending January 9, 1966 through the week ending May 29, 1966. This claim was sent to Peacock on August 31, 1966 by letter with attachment showing the hours each week at $4.60 per hour.

There are a number of reasons why this count should be denied. First it is apparent that the claim for the extra was not sent to Erickson (sic) within seven days from the last labor charged, that being for the week ending May 29, 1966, and the letter being dated August 31, 1966. Secondly the contract between Erickson and Peacock does not specify a completion date and the contract was extended to September 5, 1966. Further it appears that Erickson's contention is that he kept Davis in Brunswick with nothing to do. This, he contends, was done solely to check work previously finished by Erickson. There is no evidence to show why he was not kept there from the week of May 29, 1966 to the completion date as extended to September 5, 1966.

It is recommended that Judgment be entered against the Plaintiff on Count Four.

Count Five

This count seeks interest for late payment by Peacock under the contract which provides that Peacock will remit to Erickson within five days after the receipt of the funds from the owner. The record shows that the first receipt by

Erickson was dated December 23, 1963 and that requests were periodically made until March 24, 1966, and that although payment was not made to Erickson within the five days, nevertheless there was no demand for this interest until April 8, 1970, when Plaintiff filed its Amendment adding Count Five.

The evidence shows that Erickson received the first remittance on February 10, 1964 and the last on June 18, 1966. There is no evidence that during said period there was any contention that the payment made by Peacock was not in full or that the payment was not in full of the request.

It is argued that Erickson did not know that Peacock was withholding funds beyond the five-day period until he (Erickson) had occasion to examine the Certificates placed as evidence in this Court. (During the hearing before the Master.) There is no evidence of fraud or the discovery of the fraud, and the evidence fails to show any diligence on the part of the Plaintiff to discover the alleged breach. It further appears that the last request of Erickson was dated March 24, 1966, more than four years before the filing of Count Five. Generally speaking, each party was required by the contract to make claim within seven days.

Further, the contract between Erickson and Peacock did not provide for the payment of interest, and the payment of the principal sums, having been paid relating to Count Five and accepted by Erickson, amounts to any is, a waiver of the right to claim interest. Therefore, Judgment is recommended for Defendant.

Counter Claims

All of the evidence shows that Erickson had no employee on the job after May 29, 1966. The original Complaint was filed on the 16th day of December, 1966, Answer was filed to the Complaint but no Counter Claim was set out in the Answer. The counter claims of Peacock are first brought

into the case when amendment was filed with the Special Master on the 28th day of April, 1970. All of the Counter Claims arose out of the contract between Erickson and Peacock and at the time of the filing of the amendment more than four years had passed. No case has been cited on limitation, but since Peacock could not have maintained a Complaint on the Cross Claims, I am of the opinion that the best rule would be to hold the Counter-claims barred.

Further discussing them separately, the evidence to support each is vague, indefinite and partially speculative. With reference to "well points" $51.20, there was little evidence there was no actual proof by competent evidence and certainly not enough evidence to sufficiently carry the burden of proof.

Further the claim of $376.95 for laying boiler foundation. This foundation is concrete, was done by non-plumbing trades, and under Section 8 of the general contract the Contractor was to furnish all labor and materials for installing concrete work shown on the drawings or called for in the specifications. While Erickson wrote a letter requesting Peacock to construct the boiler foundation, he did in the same letter deny his responsibility to do the work. This work had to be done and the Special Master is of the opinion from the evidence that this claim should be and is denied.

The claim for electricity is a claim not made prior to amendments and the evidence to support it is vague, indefinite and speculative in that there were no meter charges. The attempt to prove was based on pro-ration without any actual evidence to show the type of equipment using electricity, the hours such equipment was used, how much electricity the various kinds of machinery would use per hour, and all in all, there was no substantial evidence to prove the claim which would have to be based on the amount of electricity used. Erickson paid for electricity billed to him and had no knowledge that any additional claim would be made.

The claim for damages for acoustical tile in the amount of $108.00 was for eplacing 54 tiles which were allegedly stained by reason of water damage caused by leaks. The tile was not a part of his contractual work and his liability, if any, would necessarily be based upon his failure to properly do his required work.

The Special Master having found for the Plaintiff and against the Defendant is of the opinion that costs of court and fee of Special Master as fixed by the Court be paid by Defendant and that the costs of the Court Reporter be paid share and share alike by the parties.

This 15th day of March, 1971.

Respectfully submitted,

PERRY BRANNEN
Special Master

[B] Memorandum and Order of Judge Thomas J. Clary of the District Court Dated April 28, 1971 and Entered on May 3, 1971

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

CIVIL ACTION
FILE NO. 2073

ERICKSON'S, INC.,
Plaintiff,

v.

THE TRAVELERS INDEMNITY COMPANY,
Defendant.

MEMORANDUM AND ORDER

This matter is now before the Court on defendant's motion for modification of the Special Master's Report. The de-

fendant specifically objects to the Master's allowances for prejudgment interest, and his assignment of costs to the defendant.

On the matter of costs of court and the fee of the Special Master, it is the opinion of this Court that the Special Master was in error.

Judge Scarlett had directed that such costs should be apportioned by the Master in accordance with his findings of fact as to Counts II, III and IV. As the plaintiff only prevailed in one of said counts, it is, therefore, not entitled, under Judge Scarlett's express directions, to be free of the aforementioned costs. The Court is, therefore, of the opinion that the costs of court and the fee of the Special Master should be shared by the parties.

The question of interest presents a more difficult issue. The defendant herein alleges that at all times up to the time of judgment the amount owed by them was unliquidated. They further contend that all five counts of plaintiff's complaint constituted a single claim.

It is clear that the Circuit Court in its earlier opinion on this case did not resolve the issue. See *Travelers Indemnity Co.* v. *Erickson's, Inc.*, 396 F.2d 134 (5th C.A. 1968). The Court there concluded that the record before them was too incomplete to make such determinations.

A complete review of the history of this action, and the law of Georgia, however, leads to the conclusion that the plaintiff is legally and equitably entitled to interest.

It is uncontested that the contract had a lump sum price of $684,400.00 to which should be added $7,743.84, the value of uncontested change orders, for a total of $692,143.84. Defendant had, prior to suit, paid to plaintiff the sum of $612,551.49, leaving a balance of $79,592.35. Defendant then tendered to plaintiff a check for $77,646.58 which stated that it was to be in full payment for all remaining debts.

Erickson was under no obligation to accept defendant's tender as they had a valid claim for the larger amount and contested claims of additional value. It was not until almost four years later that defendant introduced any counterclaims that would offset the $79,592.35 figure, and all of these claims (totaling $536.15) were denied by the Master.

Thus, it is apparent that Erickson was put into the position of either forfeiting nearly $2,000.00 and all other claims, or lose the use of nearly $80,000 for some four years. Under these circumstances, the defendant could not fail to achieve an unreasonable advantage.

The law of Georgia provides for the award of prejudgment interest where the amount in question is liquidated, or of an amount certained and fixed. Ga. Code Ann. § 57-110, see also *First Nat'l. Bank of Atlanta* v. *State Highway Dept.*, 219 Ga. 144, 132 S.E.2d 263 (1963).

It is clear from the record that at all times the defendant owed to plaintiff the certain and fixed amount of $79,057.24. That amount represents the balance admittedly owed of $79,592.39 less all possible offsets alleged ($536.15). The award of interest by the Master on the $1,382.76 attributable to change order #42 was unwarranted as that separate claim, for work done on the existing building (not the new wing) was at least arguably in contention.

Even if this Court were to find that the amount in controversy was not "liquidated" (within the strictest interpretation of that term), the result herein would not differ. A reading of the applicable case law leads to the conclusion that Georgia courts would, under these circumstances, follow the generally accepted rule as set forth in *Aetna Casualty & Surety Co.* v. *U.S.*, 365 F.2d 997, 1006 (8th Cir., 1966), and *Michelsen* v. *Penney*, 135 F.2d 409 (2nd Cir., 1943).

> "Where the amount for which recovery is sought, even though not liquidated, is based upon the readily ascer-

tainable value of services or property, the general and better considered rule is to allow interest, at least in the absence of strong equities to the contrary."

See also *Fluor Corp.* v. *U.S. ex rel Mosher Steel Co.*, 405 F.2d 823 (9th Cir., 1969).

In the present case the "strong equities" indicate that interest should be awarded.

ORDER

AND NOW, to wit, this 28th day of April, 1971, it is ORDERED, ADJUDGED, and DECREED that the Master's report be modified to provide that:

1. Court costs and the Special Master's fees be equally shared by the parties;
2. the amount of principal on which interest is due from the 11th day of December, 1966 be reduced to $79,058.24 (at the rate of 7%);
3. all other findings of the Special Master are affirmed.

BY THE COURT,

THOMAS J. CLARY
United States Senior District Judge

[C] Judgment Dated May 16, 1971 and Entered on May 20, 1971 by Judge Thomas J. Clary of the District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

CIVIL ACTION
FILE NO. 2073

ERICKSON'S, INC.,
Plaintiff,

v.

THE TRAVELERS INDEMNITY COMPANY,
Defendant.

JUDGMENT

The Special Master having filed his Report on March 15, 1971, and the Court having heard from the Plaintiff on its Motion to Confirm the Report of the Special Master, and the Court having heard from the Defendant on its Motion for Modification of the Special Master's Report, and each of the aforesaid motions having received the consideration of this Court on both the law and the facts, and the Court having issued an Order on the 28th day of April, 1971, confirming in part and modifying in part the Report of the Special Master, which said Order has been filed for record in this Court and upon which the Judgment of this Court is based;

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that:

1. On Count One the Plaintiff, ERICKSON'S, INC., shall have judgment against the Defendant, TRAVELERS INDEMNITY COMPANY, for the full principal sum of $71,848.55, of which amount the sum of $71,312.40 shall bear interest at the legal rate of seven (7%) per cent per annum from December 11, 1966. The

remaining portion of the Count One principal sum shall bear interest from the date of this Judgment.

2. On Count Two the Plaintiff, ERICKSON'S, INC., shall have judgment against the Defendant, TRAVELERS INDEMNITY COMPANY, in the amount of $9,126.21, of which sum $7,743.84 shall bear interest at the legal rate of seven (7%) per cent per annum from December 11, 1966. The remaining portion of $1,387.37 shall bear interest from the date of this Judgment.

3. On Count Three judgment is for the defendant.

4. On Count Four judgment is for the Defendant.

5. On Count Five judgment is for the Defendant.

6. All Court costs and the fee of the Special Master shall be equally shared by the parties, and the Clerk of the Court is hereby expressly authorized, when said data is available to him, to insert below as a part of this Judgment, the sum of $..... as one-half of the Court costs, and the sum of $1,470.00 as one-half of the fee of the Special Master.

7. Except as set forth above, and where not inconsistent herewith, the Report of the Special Master dated March 15, 1971, is incorporated herein and is expressly made part of the judgment of the United States District Court.

Dated this 28th day of April, 1971.

BY THE COURT,

THOMAS J. CLARY
United States Senior District Judge

[D] Memorandum and Order dated July 26, 1971 and entered July 27, 1971 by Judge Thomas J. Clary of the District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

CASE NO. 2073

ERICKSON'S, INC.

v.

THE TRAVELERS INDEMNITY COMPANY

MEMORANDUM AND ORDER

This matter has been reopened before this Court on defendant's motion to set aside the findings of fact and conclusions of law and the judgment entered thereon, and to grant a new trial and amend the findings of fact, conclusions of law and judgment thereon. To support their motions defendant questions the Court's findings of fact and its application of both law and equity.

This Court has again reviewed the record of the case, the Special Master's findings, the briefs of counsel and their arguments forwarded in the rehearing granted as a result of these motions. As a result of this review the Court can only find the counsel for the defendant has not brought forth any new evidence or authority which would cause this Court to amend its order of April 28, 1971.

The Court would, however, like to take this opportunity to further discuss its decision to split the fee of the Special Master equally.

On May 6, 1969 Judge Scarlett, in his order appointing the Special Master, directed that: "the compensation of the Special Master, his expenses and costs, shall be apportioned between the parties by the Special Master in accordance with his findings on the issues presented by counts Two, Three and Four of the Complaint."

It is clear that Judge Scarlett intended to place the financial burden on the party advancing the more unjust claims.

To assign one-third of the costs to the loser of each count would defeat that purpose as the amounts in controversy vary considerably between each count.

Further, defendant's insistance that count Five be included (a count added after May 6, 1969) strengthens the argument that the substance and not the form of the Order be looked to. Just as count Five arose subsequent to the Order in question, so did the controversy over interest on count One. This Court cannot take seriously, therefore, defendant's argument that count Five should be considered, but not the interest controversy concerning count One.

Considering the different apportionment methods advanced by the parties, defendant's share could arguably fall anywhere from 10-70%; the 70% figure being closer to the amount the Court would be inclined to find should it be forced into the complicated calculation the continually compounding interest and the value of the multiple claims comprising each count.

Finally, it appearing, in any event, that difference to the parties, between methods would not exceed $150, it would be just to order that they be divided equally.

Defendant's assignment of error No. Six, concerning the typographical error in the previous Order awarding 7.7% interest instead of 7.0% has been corrected by the Court and abandoned by the defendant.

ORDER

And now, to wit, this 26th day of July, 1971, it is ORDERED, ADJUDGED AND DECREED, that the defendant's motions requesting: 1) a new trial, 2) the setting aside of the findings of fact and conclusions of law and the judgment entered thereon, and 3) the amendment of said findings of fact, conclusions of law and judgment, be and hereby are DENIED.

BY THE COURT,
THOMAS J. CLARY
United States Senior District Judge

[E] Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit dated and Entered January 25, 1972

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2899
SUMMARY CALENDAR *

ERICKSON'S, INC.,
Plaintiff-Appellee,
v.
THE TRAVELERS INDEMNITY COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Georgia

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(January 25, 1972)

Before WISDOM, COLEMAN and SIMPSON,
Circuit Judges.

PER CURIAM: We review on appeal [1] an award of damages by the lower court, based upon a Special Master's Report,

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* Rule 18, 5 Cir.; See *Isbell Enterprises, Inc.* v. *Citizens Casualty Company of New York, et al.*, 5 Cir. 1970, 431 F.2d 409, Part I.

[1] This Court dealt with an earlier attempted appeal by Travelers, see *The Travelers Indemnity Company* v. *Erickson's, Inc.*, 5 Cir. 1968, 396 F.2d 134, by dismissing the appeal, on the ground that it was improvidently taken from an order not final under Title 28, U.S.C., Section 1291 and not an appealable interlocutory order under Title 28, U.S.C., Section 1292 (a).

to Erickson's, Inc. (Erickson's), a plumbing, heating and air conditioning subcontractor of Peacock Construction Company (Peacock) against Travelers Indemnity Company (Travelers) on a Labor and Material Payment Bond furnished by Peacock for the use, protection and payment of subcontractors and persons supplying labor and materials on a project for a governmental body. The project was the erection by Peacock of a substantial addition to Glynn-Brunswick Memorial Hospital Authority (Owner), Brunswick, Georgia.

The questions raised on appeal concern: (a) the propriety of the allowance by the Special Master and the court of pre-judgment interest on a portion of the award on which interest was allowed, having been determined by the trial court to be certain in amount, capable of computation, admittedly owed and "liquidated"; and (b) the action of the trial court requiring that the expenses of the Special Master's fee be paid equally by the parties.

In neither particular has the appellant Travelers demonstrated error on the part of the trial court. The judgment is AFFIRMED.

[F] Order of February 24, 1972 Denying Petition for Rehearing

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2899

ERICKSON'S, INC.,
Plaintiff, Appellee,

v.

THE TRAVELERS INDEMNITY COMPANY,
Defendant-Appellant,

Appeal from the United States District Court for the Southern District of Georgia

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(February 24, 1972)

ON PETITION FOR REHEARING

Before WISDOM, COLEMAN and SIMPSON,
Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

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(2) UNREPORTED DECISIONS FROM THE U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA, IN WHICH INTEREST WAS DISALLOWED UNDER THE SAME CIRCUMSTANCES PRESENTED BY THE CASE SUB JUDICE.

In two earlier cases, presenting the same issue as to whether prejudgment interest should be allowed, the Honorable Frank M. Scarlett, U.S. Senior District Judge for

the Southern District of Georgia, held that the special master erred in including prejudgment interest in his award. One of these cases, *McCullough Industries, Inc.* v. *Peacock Construction Company,* Civil Action No. 790, involved subcontract on the same construction project, the addition to the Glynn-Brunswick Hospital, Brunswick, Georgia, that is involved in the present case. The other case, *McCullough Industries, Inc.* v. *Peacock Construction Company,* Civil Action No. 791, arose out of a subcontract in connection with the construction of the Tift County Hospital. Copies of the judgments and special master's reports are set out below.

[A] Judgment of Judge F. M. Scarlett Entered November 1, 1968 in McCullough Industries, Inc. v. Peacock Construction Company, Civil Action No. 790, U.S.D.C. S.D. Ga.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

CIVIL ACTION NO. 790

MCCULLOUGH INDUSTRIES, INC.

v.

PEACOCK CONSTRUCTION COMPANY

JUDGMENT

The above matter came on for hearing before the Court on objections to the Master's findings filed by the defendant. Upon hearing, it appears from the record that the objections to the award of the Special Master should be dismissed in part and the award sustained in part.

It is therefore considered, ordered, and adjudged that the findings of the Master in favor of the plaintiff are hereby

sustained and judgment is hereby entered in behalf of the plaintiff in accordance with the award, save as to the item of interest accrued prior to the date of the award.

This the 1st day of November, 1968.

F. M. SCARLETT
United States Senior District Judge

[B] Report of the Special Master dated November 6, 1967 in McCullough Industries, Inc. v. Peacock Construction Company, Civil Action No. 790, U.S.D.C. S.D. Ga.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

CASE NO. 790

MCCULLOUGH INDUSTRIES, INC.
Plaintiff,

v.

PEACOCK CONSTRUCTION COMPANY
Defendant.

FINDINGS OF SPECIAL MASTER

The above stated case having been referred to me as Special Master, on November 1, 1966, by the Honorable F. M. Scarlett, Judge, United States District Court, Southern District of Georgia, to investigate, hear the evidence and render a judgment in the above stated matter, I hereby report the results of my investigation and findings as follows:

1. Investigation by the Special Master included a study of the entire record of the case, that is, the pleadings, transcript of testimony given before the Master in Savannah, Georgia on December 7, 1966, examination

of the exhibits introduced at the hearing and of depositions of witnesses taken subsequent to the hearing.

2. By agreement the parties hereto reserved their right to object to the admissability of evidence upon appeal to the Judge and the Special Master has no responsibility for ruling on admissability or relevance of evidence.

3. Defendant issued to Plaintiff a purchase order dated July 29, 1963, to supply cast stone required by Defendant in furtherance of his prime contract to construct a hospital. The purchase order called for delivery on or about December 15, 1963, but not later than 8 weeks after receipt of drawings prepared by the Plaintiff and submitted for approval to the Defendant and the Architect. The required approval was not obtained until February 5, 1964, thus fixing the delivery date as April 1, 1964. The responsibility for the long delay in approving the drawings must be borne equally by the parties; the Plaintiff for the poor quality of his presentation, and the Defendant and Architect for their cumbersome transmittal procedure and inexcusable delay in reviewing, commenting on and returning the drawings.

4. Plaintiff failed to make delivery on April 1, 1962. First shipment of the stone was made in May and delivery completed on August 5, 1964. On or about July 27, 1964, the parties finalized negotiations leading to a sub-contract dated July 14, 1964, wherein the Plaintiff agreed to accept the additional responsibility of erecting the stone he furnished under the terms of the purchase order. The sub-contract (Plaintiff's Exhibit "A") states in part, "This sub-contract includes, and therefore, supersedes Purchase Order 2352-37 issued by contractor (Defendant)." It further contains the usual admonitions; "Time is of the essence in

this sub-contract. Sub-contractor agrees to perform his work in accordance with Contractor's progress schedule." The fact that the sub-contract "supersedes" the purchase order limits the obligations of the parties to only those imposed by the sub-contract. The Defendant's allegation that the stone was late in arriving is not supported in light of the sub-contract. In fact most of the stone had been delivered before the new agreement was effected.

5. Plaintiff admitted that some of the stone failed to meet specification requirements and remedial work was necessary to make said stone acceptable. All corrective measures were made at Plaintiff's expense and the acceptability of the corrective measures is evidenced by the ultimate approval of the Architect and the Owner.

6. There remains only the question of timely erection of the stone by the Plaintiff. As of October 20, 1964, Plaintiff had put in place all but 76 small pieces of the total stone requirement, when by Defendant's action he was prevented from completing the balance of his obligation. On March 15, 1965, Defendant requested that the remaining work be accomplished. Plaintiff refused on grounds that he had not received payment for prior performance. Defendant completed remaining work of erection at a direct labor cost of $671.50 to which this Master had added the usual 25 per cent for overhead and profit; making a total of $840. Based on July 27, 1964, as the beginning date under the sub-contract and October 20, 1964, as completion date, the erection period covers 85 days. In the absence of evidence establishing a contract condition of less than 85 days, this Master considers said period of 85 days as timely performance, particularly in light of the magnitude of the project and the 720 day construction period permitted under the prime contract.

7. Defendant testified that he, as prime contractor, is responsible in the sum of $2,232.56 to a third party for charges incurred by Plaintiff in renting equipment and failing to make payment thereon.

8. The record reveals that Defendant received periodic payments from the Owner in the amount of 90 per cent of the value of the cast stone and labor of installing same, beginning with the May 1964 payment, but withheld from the Plaintiff reimbursement in like amount as required by agreement.

9. After hearing and considering the evidence, I find that the Plaintiff fulfilled his obligation under the sub-contract in that he provided acceptable material and installed same in a timely and adequate manner and is, therefore, entitled to payment in the claimed amount of $43,100 to which is to be added interest at 6 per cent per annum, as computed by this Master, for the period November 1964 to November 1967 on those monies due under the agreement, and amounting to $6,380.00 which were improperly withheld from the Plaintiff. The Defendant is, however, entitled to recover the sum of $840.00, the expense of erecting the balance of the stone, and the sum of $2,232.56 for equipment rental, a total of $3,072.56.

10. I, therefore, find in favor of the Plaintiff on the issue of fact, and against the Defendant in the principal sum of $46,617.44 together with future interest on said sum in the amount of 7 per cent per annum, all costs of court, including Master's compensation, and a reasonable fee, to be fixed by the Court, for the Plaintiff's Attorney.

11. The stenographic report of the evidence introduced before the Master along with the exhibit and other documentary evidence is attached hereto.

This 6th day of November 1967.

W. ZIMMERMAN
Special Master

[C] Judgment of Judge F. M. Scarlett Entered November 1, 1968 in McCullough Industries, Inc. v. Peacock Construction Company, Civil Action No. 791, U.S.D.C. S.D. Ga.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

CIVIL ACTION NO. 791

MCCULLOUGH INDUSTRIES, INC.

v.

PEACOCK CONSTRUCTION COMPANY

JUDGMENT

The above matter came on for hearing before the court on objections to the Master's findings filed by the defendant. Upon hearing, it appears from the record that the objections to the award of the Special Master should be dismissed in part and the award sustained in part.

It is therefore considered, ordered, and adjudged that the findings of the Master in favor of the plaintiff are hereby sustained and judgment is hereby entered in behalf of the plaintiff, in accordance with the award, save as to the item of interest accrued prior to the date of the award.

This the 1st day of November 1968.

F. M. SCARLETT
United States Judge

[D] Report of the Special Master dated November 6, 1967 in McCullough Industries, Inc. v. Peacock Construction Company, Civil Action No. 791, U.S.D.C. S.D. Ga.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

CASE NO. 791

MCCULLOUGH INDUSTRIES, INC.
Plaintiff,

v.

PEACOCK CONSTRUCTION COMPANY
Defendant.

FINDINGS OF SPECIAL MASTER

The above stated case having been referred to me as Special Master, on November 1, 1966, by the Honorable F. M. Scarlett, Judge, United States District Court, Southern District of Georgia, to investigate, hear the evidence and render a judgment in the above stated matter, I hereby report the results of my investigation and findings as follows:

1. Investigation by the Special Master included a study of the entire record of the case, that is, the pleadings, transcript of testimony given before the Master in Savannah, Georgia on December 7, 1966, examination of the exhibits introduced at that hearing and of depositions of witnesses taken subsequent to the hearing.

2. By agreement the parties hereto reserved their right to object to the admissibility of evidence upon appeal to the Judge and the Special Master has no responsibility for ruling on admissibility or relevance of evidence.

3. Plaintiff did in fact fulfill his obligation to fabricate and deliver the stone called for by a Purchase Order issued by the Defendant. The allegation by the Defendant that the stone was improperly fabricated and generally unacceptable as delivered is admitted by the Plaintiff's witnesses. However, in light of the successful effort by the Plaintiff, at his own expense, to remedy the admitted deficiencies of workmanship and material, is evidenced by ultimate acceptance by Architect and Owner and without penalty to the Defendant for tardy deliver of the facility, the matter of acceptability of quality is not of concern.

4. Defendant in his answer and counterclaim asserts that he was delayed for a period of 26 weeks in completing his contract to construct the Tift County Hospital by virtue of the Plaintiff's failure to make timely delivery of the stone as required by the terms of the Purchase Order. Submitted in evidence at the request of this Master is a "Schedule of Progress" for the Tift County Hospital prepared by the Defendant, and indicating thereupon the proposed schedule of progress and the actual schedule of progress. This record indicates that actual completion was accomplished 23 weeks after the proposed completion date. Further, the chart reveals that the project was actually behind schedule by 11 weeks at the time the proposed progress required that masonry and stone work commence. The schedule further establishes that the time actually required to complete the project after the masonry was finished exceeded the scheduled time by 2 weeks. Hence, of the 23 weeks of actual delay, 13 weeks were attributable to the Defendant's causes and 10 weeks to the Plaintiff's.

5. After hearing and considering the evidence, I find that the Plaintiff did in fact fulfill his obligation to provide the stone and is entitled to receive payment

in the claimed amount of $33,280.00 reduced by the sum of $17,150.00 representing additional expenses incurred by the Defendant due to Plaintiff's failure to make timely delivery as required by the purchase agreement.

6. I, therefore, find in favor of the Plaintiff on the issues of fact in the case and against the Defendant in the sum of $16,138.00 principal, together with future interest on said sum at the rate of seven per cent (7%) per annum, all costs of court, including Master's compensation payment, and a reasonable fee for the Plaintiff's attorney which is to be fixed by the Court.

7. The stenographic report of the evidence introduced before the Master along with the exhibits and other documentary evidence is attached hereto.

This 6th day of November 1967.

W. ZIMMERMAN
Special Master